



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

December 16, 2020

To:

Hon. Richard J. Nuss
Circuit Court Judge
Fond du Lac County Courthouse
160 S. Macy St.
Fond du Lac, WI 54935

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 S. Macy St.
Fond du Lac, WI 54935

Eric Toney
District Attorney
Fond du Lac County
160 S. Macy St.
Fond du Lac, WI 54935

Margaret M. Vinz
Vinz Law Office
P.O. Box 66
Kingston, WI 53939-0066

Maura F.J. Whelan
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2020AP310-CR

State of Wisconsin v. Sebastian J. Snyder (L.C. #2018CF804)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Sebastian J. Snyder appeals from a judgment convicting him of substantial battery with intent to cause bodily harm, as party to a crime and as a repeat offender, and from the circuit court's order denying his motion for sentence modification based upon a new factor. The new factor, Snyder argues, is that he neglected to tell the court at sentencing that the victim started the

fight and that he twice tried to end the fight. The court found that Snyder presented no new factor, and even if one construed the additional facts as a new factor, sentence modification was not justified. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ As we agree that Snyder’s claimed “new facts” do not constitute a new factor, we affirm.

On December 11, 2018, Snyder went to the victim’s home and got into a physical altercation. The victim required fifteen stitches to his face. Snyder was charged with substantial battery with intent to cause bodily harm and disorderly conduct, both as party to a crime and as a repeat offender. Snyder pled no contest to the substantial battery charge, and the disorderly conduct charge was dismissed and read in. At sentencing, Snyder told the court that the victim made disparaging remarks about him and asked Snyder if he wanted to fight. Snyder claimed that the victim “came at me and we proceeded to fight.” Snyder said that he tripped the victim but let him get up, at which time the victim again came at him and knocked him down. Snyder claimed that the victim tried to punch Snyder in the face but missed and hit the ground.

The court sentenced Snyder to one year and three months’ initial confinement and two years’ extended supervision.

Snyder moved for sentence modification, arguing that he did not tell the court several key facts about the fight:

- (a) the physical fight commenced when [the victim] rushed [Snyder] while [Snyder] still had his arms in his coat;
- (b) [Snyder] got [the victim] down on the ground twice and each time allowed

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

[the victim] to get back up and the fight continued because [the victim] either attempted to hit [Snyder] or rushed him[;] and (c) the fight ended when Mr. Snyder freed himself after being knocked to the ground by [the victim], got back up and told [the victim], “We’re done.”

The court denied the motion in a written order without a hearing. We could not agree more with the court’s reasoning:

To suggest that this Court unknowingly overlooked “new factors” is not remotely supported by the record. A thorough review of the file and record, including the extensive 35 page Sentencing Transcript, would refute the same and unequivocally support this Court’s proper exercise of its discretion in imposing sentence. The defendant’s character, need to protect the public and seriousness of the offense were addressed at length. Balancing the punitive component of the offense with the defendant’s rehabilitative needs was also addressed.

That portion of the transcript containing the defendant’s exercise of his right of allocution must also be considered. His allocution consisted of 9 pages He prefaced his comments by stating[,] “I would like to make my formal statement in regard to what actually happened ... that night.” Now he would like to temper his allocution by quantifying his apparent role in the incident. This does not represent a new factor, but rather his opinion over seven months after he was sentenced. To suggest that this does not present “reflection and second thoughts” is incomprehensible.

....

Further, this Court asserts that to prevail on a motion for sentence modification the defendant must demonstrate both ... the existence of a new factor and ... that the new factor justifies a modification of his sentence. This Court also makes the alternative finding that even if a new factor could be either construed or identified that the same does not justify a modification of sentence.

Given the foregoing[,] this Court concludes that the motion is unfounded, without merit and not supported by the evidence, extensive record, pertinent facts or applicable law.

Accordingly, the MOTION IS DENIED, sua sponte. Further, said motion neither invites nor warrants any hearing.

Whether a defendant has presented facts that constitute a new factor is a question of law that we review independently of the circuit court. *State v. Harbor*, 2011 WI 28, ¶33, 333

Wis. 2d 53, 797 N.W.2d 828. A new factor is defined as “a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (citation omitted). “The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *Id.*, ¶36. If the circuit court determines as a matter of law that a new factor is not present, “it need go no further in its analysis.” *Id.*, ¶38 (citation omitted). If, however, a new factor is present, “the circuit court determines whether that new factor justifies modification of the sentence.” *Id.*, ¶37. “The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court,” which we review for an erroneous exercise of discretion. *Id.*, ¶¶33, 37.

The “new facts” Snyder alludes to in his motion do not constitute a new factor. These facts were known by Snyder, which he readily admits, when he made his sentencing remarks, and it was his tactical choice to omit assertions of those “facts” during sentencing. *See Rosado v. State*, 70 Wis. 2d 280, 288-89, 234 N.W.2d 69 (1975). Snyder’s desire to change the tactical choice he made in an attempt to soften his sentence does not present a new factor. As Snyder presented no new factor, the court appropriately denied his motion without a hearing. *See State v. Grindemann*, 2002 WI App 106, ¶19, 255 Wis. 2d 632, 648 N.W.2d 507 (Upon receiving a postconviction motion requesting sentencing modification, a court “may either deny the motion if ‘the motion and the files and records of the action conclusively show that the person is entitled to no relief’; or ... ‘grant a prompt hearing.’”); *see also* WIS. STAT. § 974.06(3).

The court also properly exercised its discretion when it concluded that even if one were to construe Snyder's "new facts" to be a new factor, a sentence modification was not justified. The court properly exercised its discretion by highlighting the relevance of Snyder's character, the need to protect the public, and the seriousness of Snyder's offense.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals